For over a year, I have submitted comments giving my opinions on issues of importance to the FCC as a layman and concerned citizen interested in the state of the TV industry. Later this month I will publish my first book, *The Game to Show the Games*, about the mad dash of major media companies to rack up as much sports rights as they can and – among other things – how it's affected the TV industry as a whole. I have attached an excerpt from a draft of the book that is of particular relevance to the present retransmission consent proceeding.

It's all too easy to guess what both sides will say in this debate, because they've been making the same arguments for over six years. Cable and satellite operators will claim the retransmission consent rules are tilted in favor of broadcasters and need the sort of reforms the Commission proposes to stop blackouts and keep cable rates from going up for consumers. Broadcasters will say that they provide valuable local programming backed by the network-affiliate model in place for over 65 years and which retransmission consent helps them continue to provide, and that if anything the Commission should make things easier for them by loosening the ownership rules they will claim are outdated in an age of increased competition from cable networks, cable operators themselves, and the Internet. Neither will tell the whole story about each other's position, let alone their own, because that would require cable operators to reveal just how broken their own business is, a business that broadcasters have come to be so dependent on they may want it disrupted less than cable operators do.

The truth is, the landscape of retransmission consent and the assumptions underlying it have changed little since the 1992 Cable Act, and not all of the changes have been in ways either cable operators or broadcasters are comfortable disclosing. As the attached excerpt shows, retransmission consent was always devised as a way for broadcasters to compete with the subscription-fee revenue cable networks were collecting by the late 80s. The model that developed, of broadcast stations electing whether to take retransmission consent and keeping basic-tier carriage if they did, was in large part a response to concerns from smaller stations that might suffer if an earlier proposal allowing cable operators to either take all broadcasters and pay due retransmission consent for them or carry none of them was adopted. For over a decade very few stations elected retransmission consent as cable operators put up a united front against paying broadcasters, and the major networks used retrans to launch cable networks and take advantage of cable's advantages that way.

By the mid-to-late 2000s, the market shifted in important ways as satellite and telco providers came online, providing cable operators with newfound competition and broadcasters with increased leverage to demand retransmission payments from all three. This, however, did not accelerate the collection of fees to pay for retransmission consent as much as ESPN's 2008 deal with the Bowl Championship Series, which put events that broadcast had taken for granted – the Rose Bowl and college football's national championship – on cable, and shined a spotlight on ESPN's greater ability to compete for sports rights thanks to their ability to collect money from both advertising and lucrative subscription fees, while broadcast networks were stuck with only the former.[1] It raised the prospect of nearly every major sporting event moving to ESPN if left unchecked; in 2011, ESPN's then-head of content John Skipper suggested that only the NFL was insistent on putting its championship on over-the-air television beyond

[1] Reply Comments of Morgan Wick in the matter of MB Docket RM-11728 (Petition to Amend the Commission's Rules Governing Practices of Video Programming Vendors), 14 Oct 2014, pp. 2-4.

the next three or four years.[2] Fox, which had been the incumbent on the BCS contract and would become a leader in aggressively pursuing monetary compensation, was explicit about the need for a dual revenue stream to compete with cable networks for sports rights and other valuable programming that now enjoyed a presence in the vast majority of American households.

Nearly everything about the evolution of the retransmission consent marketplace in the last seven years can be explained by reference to the need and desire to compete with ESPN on sports rights. Broadcast networks began aggressively pursuing retransmission consent to compete with ESPN's dual revenue stream, and have demanded a cut and inserted themselves into their affiliates' negotiations so they can collect money from every pay-TV subscriber that receives their network the way ESPN, as a national network, does. From broadcasters' point of view, if the retransmission consent marketplace is tilted in their favor, it's only because it *needs* to be to prevent every sporting event from going the way of the BCS or its successor the College Football Playoff. I only bring this up in the context of sports rights because sports rights are the programming everyone is bending over backwards to acquire; the same dynamic would play out for any other valuable programming where broadcast must compete with cable's dual revenue stream and relative lack of regulations on content.

Perhaps most tellingly, the need for retransmission consent to compete for sports rights and other valuable programming means broadcasters need to avoid any situation where people can pay for cable networks but receive broadcast networks without paying for them, meaning broadcasters desperately cling to the basic-tier mandate at all costs so consumers won't have a reason to supplement their cable subscription with an antenna to pick up broadcast stations for free. This has had the effect that broadcasters, especially the major networks on the front lines of acquiring valuable programming and with their own substantial investments in cable networks, have come to disdain their own nominal medium, to the point that during the court fight over Aereo, they threatened to pull their programming from the free airwaves entirely if Aereo kept winning in court. Broadcast networks have given away that they would rather be cable networks with their dual revenue stream, and only remain broadcast networks so long as they can use retransmission consent to mimic it. As such, they have limited the ability to view their content without a cable subscription at every turn, only making live streams of their content available through the authenticated "TV Everywhere" model developed by the cable industry, blacking out availability of their free online on-demand content from broadband subscribers of an MVPD currently blacked out of their linear stream, and expressing reservations about the impending "ATSC 3.0" standard that would correct many of the shortcomings of the existing digital standard and provide a technological framework for the long-term viability of broadcast television.[3] Retransmission consent, it turns out, has always been a Band-Aid for cable's advantages over broadcast, as the fundamental underlying dynamic that the consumer can watch an over-the-air broadcast station without paying for cable has not changed. Nor has it been all that effective at it: given the choice between putting content on a broadcast station or on a co-owned cable network, a media company that owns both has no reason not to choose the latter if they can make more money that way and get away with it.[4]

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[2] Ourand, John, "The great cable migration", SportsBusiness Journal, 21 Feb 2011, retrieved from http://www.sportsbusinessdaily.com/Journal/Issues/2011/02/21/In-Depth/Media-story.aspx.

[3] Jessell, Harry A., "ATSC 3.0: Lead, Follow Or Get Out Of The Way", TVNewsCheck, 14 Nov 2014, retrieved from http://www.tvnewscheck.com/article/80837/atsc-30-lead-follow-or-get-out-of-the-way.

[4] Reply Comments of Morgan Wick in the matter of MB Docket 15-158 (Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming), 21 Sep 2015, p4, retrieved from

Thus whatever problems there are with retransmission consent, they are only symptoms of a larger problem bedeviling the cable and broadcast industries, one that is probably beyond the scope of this proceeding and may require Congressional action to solve. Enforcing a la carte carriage of cable networks would help curb runaway subscription fee increases and restore broadcast's audience advantage over cable, but it's not clear the FCC has the authority to do that, certainly within this proceeding. Continued cord-cutting may let the free market resolve the issue itself by providing a check for the rising cost of cable and potentially resulting in the breaking of the bundle into "skinny bundles", but it doesn't necessarily mean putting up an antenna to pick up broadcast stations, and so long as broadcast networks see retransmission consent as fundamental to their business and aim to protect their co-owned cable networks that's not likely to change. With any long-term solution likely to involve something that nullifies the influence of subscriber fees charged to every cable customer, it's also likely to involve phasing out retransmission consent entirely, giving broadcasters even more of an investment in the status quo. I've said before that broadcast linear television actually has more of a reason to exist in the content landscape of the future than cable networks, especially with ATSC 3.0,[5] so I would hope something could be done to wean the broadcast industry off its utter dependence on retransmission consent and provide a reason beyond mere PR to distribute its high-value content for free, but I don't know what it is (though I have some ideas) and I'm not confident the FCC is actually all that interested in the long-term health of broadcasting, given how it's rushing into the incentive auction and structuring it in a way that might permanently cripple the industry.[6] But the solution is certainly not to allow continued broadcast industry consolidation; if anything tightening, not loosening, the commission's ownership rules, especially in the largest markets, would ideally allow entities outside the four major networks (and thus less invested in cable networks) to attempt to provide quality programming that would improve the overall viability of over-the-air broadcasting.[7]

Whatever the case, when issues of retransmission consent have been raised at the FCC, this larger problem has usually been absent, as cable operators have attempted to scapegoat broadcasters as being solely responsible for the problem, and any involvement of cable networks owned by broadcasters as being a retransmission consent issue, rather than an issue with this larger problem. In many cases, it makes no sense to single out broadcasters on these issues when we look at broadcast stations as another variety of cable network, as broadcasters do. For example, the present Notice of Proposed Rulemaking asks whether the commission should address the practice of bundling broadcast stations with other broadcast stations or cable networks. There is no mention of the practice of bundling cable networks with other cable networks, without involvement of broadcast stations, not even in the

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http://apps.fcc.gov/ecfs/document/view?id=60001324547. For how Disney has already begun prioritizing its cable ESPN network for sports content over the ABC broadcast network, see Reply Comments of Morgan Wick in the matter of MB Docket RM-11728, pp. 3-5.

[5] Reply Comments of Morgan Wick in the matter of MB Docket 14-50 (2014 Quadrennial Regulatory Review), 8 Sep 2014, pp. 14-16, retrieved from http://apps.fcc.gov/ecfs/document/view?id=7521829536; Response of Morgan Wick to the House Committee on Energy and Commerce White Paper on Regulation of the Market for Video Content and Distribution, 23 Jan 2015, esp. pp. 1-3, retrieved from http://www.morganwick.com/commactupdate.pdf.

[6] Comments of Morgan Wick in the matter of MB Docket 12-268 (Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions), 20 Feb 2015, p1, retrieved from http://apps.fcc.gov/ecfs/document/view?id=60001032101; Reply Comments of Morgan Wick in the matter of MB Docket 15-158, pp. 5-6.

[7] Ibid., pp. 8-12.

comments the commission cites to support this inquiry.[8] More specifically, the commission invites comment on whether it should be considered evidence of bad faith for broadcasters to insist on bundling a broadcast signal with other "must-have" programming such as regional sports networks.[9] The implication is that if Fox is tying carriage of its owned-and-operated stations with regional sports networks it owns in the same markets, this should be treated as evidence of bad faith in its negotiations regarding its broadcast stations, but if it is tying the RSNs with the Fox News Channel or the National Geographic Channel, the commission would not step in at all.

All this is despite Cablevision engaging in a high-profile legal dispute with Viacom, which has no interests in broadcast stations, over the course of two years over just this practice, as noted in the attached excerpt, and despite the fact that Mediacom's 2014 unbundling petition, which the commission cites repeatedly to justify this inquiry, applied to *all* programming suppliers, not just broadcasters.[10] The distinction is important: I suggested in response to NAB's concerns over the Mediacom petition that, if must-carry rules remained in effect, the restoration of broadcast's audience advantage over cable that Mediacom's petition, properly tweaked, would allow would more than make up for any disruption in broadcasters' retransmission consent revenue by, ideally, removing the reason for broadcast's dependence on retransmission consent in the first place.[11] To be sure, retransmission consent is what is at issue in the present proceeding, and the FCC has a long history of disclaiming any authority over cable networks, but so long as it is not willing or able to step in in the larger cable network market, it should not treat broadcast stations any differently than cable networks are treated except as the law, broadcast stations' free over-the-air availability, and broadcast networks' decentralized, locally-based infrastructure require.

But the attempt by cable operators and satellite providers to frame these issues as solely involving retransmission consent permeates their every dealing with the FCC; cable operators have gone so far as to attempt to frame as retransmission consent issues things that are, at least nominally, completely irrelevant to negotiations for broadcast stations and that are common regardless of whether the owner of the cable network has any interests in broadcasting, such as minimum tier-placement and penetration requirements.[12] Doubtless in this proceeding they will attempt to push their "Local Choice" proposal they unsuccessfully tried to attach to the STELAR legislation, under which broadcasters that elect retransmission consent can give consumers a take-it-or-leave-it offer to receive their programming.[13] Applied to *all* of the networks a cable operator carries, such would be an excellent approach to curbing content costs, giving choice back to the consumer, and making broadcasters less dependent on retransmission consent, especially given the model in place on the Internet.[14] Applied

[8] Notice of Proposed Rulemaking, Implementation of Section 103 of the STELA Reauthorization Act of 2014: Totality of the Circumstances Test, MB Docket 15-216, pp. 13-15, para. 15, retrieved from https://apps.fcc.gov/edocs_public/attachmatch/FCC-15-109A1.pdf.

[9] Ibid., p14.

[10] Mediacom Communications Corporation Petition for Rulemaking, Docket RM-11728, 21 Jul 2014.

[11] Reply Comments of Morgan Wick in the matter of MB Docket RM-11728, pp. 5-8.

[12] NPRM, para. 16, p16.

[13] Frederick, Brian, "Local Choice is a Simple Solution to End Broadcast TV Blackouts Once and For All", Multichannel News, 12 Aug 2014, retrieved from http://www.multichannel.com/blog/capital-letters/local-choice-simple-solution-end-broadcast-tv-blackouts-once-and-all/383134.

[14] I approached a similar proposal in the Reply Comments of Morgan Wick in the matter of MB Docket RM-11728, pp. 9-10.

only to broadcast stations, however, without regard for the cable networks that have forced them to ratchet up retransmission consent fees in the first place, it would merely convince consumers to drop any stations electing retransmission consent they can pick up for free with an antenna, and thus must be seen as an attempt by the cable industry to destroy over-the-air broadcasting as a meaningful alternative to their services.

If the FCC is truly interested in the long-term survival of over-the-air broadcasting – and as stated before, I'm not sure they are – they should not fall for these scapegoating tactics that Congress seems to have partially fallen for in asking the commission to "fix" retransmission consent in the first place. To the extent they do fix retransmission consent, they should do so with an eye to the larger issue of pay-TV programming costs and avoid doing anything that would give cable networks too much of an advantage again. In the long term, they should consider, to the extent their authority allows, taking steps to correct this larger issue and allowing broadcasters to compete for content without relying so heavily on retransmission consent, in the process allowing broadcast television to be a worthwhile investment (especially compared to cable networks and outside Big Four affiliates) for more than large corporations and spectrum speculators again – and to begin taking these steps before the incentive auction so that no station gives up broadcast television spectrum they'll regret. One short-term way to do this could involve the Commission's proposal to classify online video distributors as MVPDs.[15] Certainly they should not allow media companies to circumvent the spirit of the recent prohibition of coordinated negotiation among non-co-owned stations by surrendering the nominally-separately-owned license and operating that station as a subchannel of their existing station.[16] So long as the commission at least considers all this and does not let pay-TV operators and broadcasters solely determine their perspective on these issues, they should achieve outcomes that will best benefit consumers, broadcasters, and the public interest.

Morgan Wick
Venice, CA
December 1, 2015

[15] Reply Comments of Morgan Wick in the matter of MB Docket 14-261 (Promoting Innovation and Competition in the provision of Multichannel Video Programming Distribution Services), 1 Apr 2015, pp. 2-5, retrieved from http://apps.fcc.gov/ecfs/document/view?id=60001042156.
[16] Ibid., pp. 17-19.

Attachment: How the Rush for Subscription Fee Revenue Has Changed the Television Industry

Contains content from the forthcoming book *The Game to Show the Games* by Morgan Wick (Azzurri Publishing, 2015). Not all of the below content may appear in the book.

Chet Kanojia had been the head of Navic Networks, a startup offering set-top box technology that tracked audience demographics and allowed networks to tailor their advertising to them in real time. Navic's data showed that at any given moment, roughly half of cable TV viewers were watching local broadcast stations. Kanojia reached the conclusion that if people could reliably get broadcast television signals on any device with the ability to time-shift shows and enjoy the social nature of the Internet, it might make people more willing to drop cable and satellite TV. So after selling Navic to Microsoft in 2008, Kanojia formed a new startup, Bamboom Labs, promising to stream free, over-the-air signals over the Internet to connected devices.[1]

It would not be easy. Copyright laws give the holders of copyright to TV programs the exclusive right to determine how to distribute it. Bamboom could not simply put up an antenna and retransmit the shows it picked up to customers without obtaining a license from the networks first. Numerous other startups, such as Ivi TV, had tried to do the same thing and wound up on the wrong end of infringement lawsuits that put them out of business. But Kanojia felt he had found a solution that would pass legal muster: in each market, he would put up a huge array of teeny-tiny antennas and rent them out to customers. The customers would be in control of the antenna, not Bamboom, so the situation would not be fundamentally any different from someone putting an antenna on their roof. Furthermore, programming wouldn't be distributed outside the local market and there would be severe restrictions on customers' ability to share programming or watch it on multiple devices. Kanojia had reason to believe the argument would pass legal muster: Cablevision had won a court ruling supporting a similar system for its cloud-based DVR service. It was enough to convince venture capitalists to give Bamboom \$4.5 million in seed financing in April 2011, allowing it to begin beta tests in the New York City area.[2]

Ten months later, Bamboom, now named Aereo, scored a major coup when IAC/InterActiveCorp gave it \$20.5 million in further funding, allowing it to prepare for a full-fledged launch in New York in March 2012. IAC's chairman, Barry Diller, joined Aereo's board of directors and became the public face of the company. Diller had played a key role in the launch and rise of the Fox network and was now prepared to go on the front lines in a bitter legal fight against his own creation, hoping to free the networks' content from, as he put it, the "closed cable-broadcast-satellite circle" that refused to let any of its content out to Internet streaming services.[3]

As Aereo prepared to launch in full in New York in March 2012, broadcasters and other businesses representing all four major networks, Univision, and PBS filed two suits in federal court in New York, alleging copyright infringement.[4] In July, a judge denied a motion for a preliminary injunction that would have forced Aereo to shut down while the case was litigated, stating that the plaintiffs had not shown their likelihood to win on the merits of their case and that there was reason to believe the Cablevision precedent would hold.[5] Broadcasters promptly appealed, and Cablevision itself filed a brief laying out what it saw as the differences between its own case and Aereo.[6] But a three-judge panel of the Second Circuit agreed with the lower court.[7] Ultimately over two years of litigation in New York and elsewhere ensued, where the underlying cases were rarely if ever actually resolved because broadcasters refused to accept judges' rulings just to keep the lights on at Aereo while they were. Broadcasters did win injunctions against the "Aereokiller" service in California[8], and against the FilmOn service from the same people in D.C. District Court (forcing that service to shut down everywhere outside the Second Circuit)[9], but not Aereo itself. The broadcasters ended up appealing the case – still only looking for an injunction – to the Supreme Court, a move Aereo welcomed as a means to hopefully put a stop to broadcaster litigation.[10]

The legal question was whether Aereo was engaged in a "public performance" under copyright law, but the case would really turn on the question of what Aereo actually was. Aereo claimed it was little more than a mechanism for the delivery of the over-the-air broadcast content from personal antennas people already have the right to receive for free – no different from setting up an antenna and attaching it to a TV and Slingbox, only over a longer distance. But from a consumer point of view, there wasn't much difference between picking up broadcast content from a service like Aereo or from a cable operator. So from the broadcasters' point of view, Aereo was effectively operating as a cable operator that had found a loophole in the rules to allow it to claim not to be. At the top of their mind was the prospect that cable operators might decide to set up Aereo-like systems to get away with not paying them either[11] - and on that front Aereo was not helped by the brief in its defense by the American Cable Association, a consortium of smaller cable operators, that suggested its members might consider an Aereo-like system[12], or its own flirtations with adding cable content if it won. Aereo claimed it was trying to comply with the law, not circumvent it.[13] Diller claimed his backing of Aereo wasn't an attempt to kill broadcast TV, touting its value as a conduit for local news.[14] Rather, he claimed his goal was moving the "centricity" of video away from the "closed" systems of cable or satellite to the "open" Internet system.[15] Given that video was moving to the Internet anyway, Kanojia argued that Aereo was "the only logical architecture that exists".[16]

The Court ultimately ruled 6-3 against Aereo, saying that Aereo was, indeed, engaging in a public performance in spite of the technological steps Aereo had taken to avoid that. The dissenting justices, Scalia, Thomas and Alito, argued that the majority could only rule that way by subjectively deciding that Aereo "looked like cable TV".[17] Aereo shut down its service shortly thereafter as it began looking into next steps[18] and called on their customers to write their members of Congress[19]; it eventually decided to file the necessary paperwork to be recognized as a cable company entitled to a statutory license[20], but Diller had suggested there was no value in going that route[21], and the Copyright Office indicated it did not believe Aereo qualified for such a license, though it did not outright reject its application.[22] Within six months of the high court's decision, Aereo had filed for Chapter 11 bankruptcy[23]; a subsequent auction of many of its assets, which Aereo hoped would raise $4 million to $31.2 million, ended up raising just over $1.5 million, most of it from Tivo, who paid $1 million for the Aereo trademark and customer lists.[24] Aereo eventually reached a settlement that paid the broadcasters $950,000.[25]

The Aereo case illustrated just how much technology, and the Internet specifically, had begun breaking down many of the assumptions of the television industry, a phenomenon we'll get into in more detail in the last chapter. But for the average American that may have been hearing about or trying to follow the case, there was a more fundamental question that rarely seemed to be answered. If broadcast television is available over-the-air for free, what damages could Aereo possibly be inflicting on broadcasters? Why were broadcasters so committed to preserving the cable ecosystem? Why wouldn't they accept Aereo's argument that Aereo was simply extending the reach of their signals? The answer has to do with a piece of law, originally intended simply to allow broadcasters to share in some of the boons of the cable television revolution, that has now become so critical to their business – thanks in no small part to the growing importance of sports to the television industry – that, as the Aereo case showed, they are perfectly willing to destroy the village in order to save it.

By the late 80s and early 90s, the impact the rise of cable was having on the television landscape was already quite profound, and at the time, direct-broadcast satellite services were in their infancy, meaning the monopoly power many cable operators had was absolute. If you wanted any of the smorgasbord of new channels cable had opened up, in most cases you had exactly one option, and in turn potential programmers would have to deal with that one option or face nonexistence in the areas that company served. There was already concern about the threat the rise of cable might pose to the broadcast industry, and Congress had adopted must-carry rules requiring cable operators to carry all signals in a given area.[26] But for many broadcasters, particularly the network affiliates that had the most in-demand programming, it wasn't enough.

The subscriber-fee model pioneered by ESPN was already common enough that broadcasters were already smarting over the fundamental inequity that cable operators weren't similarly compensating them, despite the greater popularity of programming on broadcast. To broadcasters, cable operators were building an empire on the backs of their programming without paying them, then turning around and using those revenues to compete against them, especially for sports rights.[27] In 1990 the National Association of Broadcasters attempted to float a proposal that would allow cable operators to choose between carrying broadcast signals and paying broadcasters accordingly, or not carrying any broadcast signals at all, but the proposal went nowhere in Congress, and smaller, independent stations refused to give up the strong must-carry rights they enjoyed.[28] The Congressional effort to impose tougher regulation on the cable industry stalled in the face of opposition by the Bush administration, so the following year NAB went back to Congress with a new proposal: this time, broadcasters could decide whether they wanted to negotiate with cable operators for compensation, or forego such compensation and invoke their must-carry rights.[29] Spearheaded by Sen. Daniel Inouye (D-Hawaii), this was fundamentally the form retransmission consent took in the bill that eventually became the Cable Television Consumer Protection and Competition Act of 1992, passed over President Bush's veto on October 5.

The new retransmission consent marketplace was slow to develop. Most broadcast stations stuck with their long-standing must-carry rights, and CBS, which had been at the forefront of pushing for retransmission consent, found themselves faced with a united front of cable operators when they attempted to charge for their signal. The other networks fared better by using retransmission consent as leverage to give cable networks a broad launch: ABC with ESPN2, Fox with FX, and NBC with the forerunner to today's MSNBC.[30] This remained the state of the retransmission consent marketplace well into the 2000s: a subsidy for the launch and continued carriage of cable networks.

But in the later part of the decade, the growth of direct-broadcast satellite services, and later telco services such as Verizon's FiOS and AT&T's U-Verse, gave broadcasters more leverage to demand cash payments from cable and satellite operators, now that customers' only alternative was no longer using an antenna and not paying broadcasters anything.[31] Satellite and telco providers paid up knowing they couldn't win customers away from cable without local stations, emboldening broadcasters to take a harder line to get cable companies to pay up lest they lose customers to the satellite and telco services that were already doing so – especially as they pushed for carriage of high-definition signals.[32] This came just as a number of factors greatly transformed the economics of the broadcasting industry and made retransmission consent more important than ever. Not the least of these developments was the 2008 BCS deal with ESPN, which shined a spotlight on the necessity of broadcast networks to find a way to replicate ESPN's dual-revenue stream if it hoped to continue to compete for sports rights, and which coincided with the Great Recession wreaking havoc on advertising revenue. "We need to have a business model that enables us to compete with the ESPNs and the TNTs and USAs that are doing more original programming and buying more sports programming," said News Corporation Chief Operating Officer Chase Carey. By 2009, Fox and CBS were making renewed pushes for direct payments for their owned-and-operated stations' signals.[33] Retransmission consent revenues grew over tenfold over six years, from $215 million industrywide in 2006, the year CBS started pressing cable operators, to $2.4 billion in 2012.[34]

But in order to properly benefit, networks would have to collect money from all their stations, not just their owned-and-operated ones. For most of the history of television, networks paid their affiliates to put their programming on the air and sell national advertising off it, a system the networks were already pushing to reverse earlier in the decade. By 2009, networks were pushing for as much as half of what their affiliates were collecting in retransmission consent,[35] as well as inserting themselves into negotiations directly, arguing that they could negotiate a higher price out of cable operators than affiliates were doing on their own.[36] Some affiliate owners, many of whom had been out in front when it came to collecting cash from cable operators, chafed at this development,[37] but others saw the networks as "partners",[38] recognized the importance of sharing retrans revenues to the networks' continued ability to retain tentpole programming,[39] and that major network programming was the big reason major network affiliates could rake in so much cash.[40] But many affiliate owners found that sharing revenue with networks effectively caused the retransmission consent stream to dry up as far as they were concerned.[41] SNL Kagan estimated that affiliates were giving up 45% of their retransmission consent revenue in 2014, but projected it to rise to 50% by 2019 if not sooner, with networks pushing for much higher percentages.[42] As much as individual stations may have led the way, the renewed push for reverse compensation made it increasingly clear that retransmission consent was working primarily for the networks – which, after all, were on the front lines of fighting to avoid losing their programming advantages to cable.

Cable operators almost immediately called for Washington to step in, complaining that retransmission consent rules, now that cable no longer had an effective monopoly, were tilted in favor of broadcasters, as broadcasters could threaten to and actually black out programming if operators did not meet their rate demands. Because stations that requested retransmission consent were still required to be shown on the basic tier of service, the increased push for retransmission consent fees forcibly increased everyone's cable bill. Moreover, retransmission consent, which had been explicitly sold as a means to protect local stations and allow them to continue to produce local broadcasting, with NAB explicitly promising national networks would play no role in retransmission consent negotiations, had effectively become a subsidy for the broadcast networks, as increased demands for compensation resulted in stations cutting the local programming retransmission consent was supposed to protect. Meanwhile, while retransmission consent and other provisions of the 1992 Act successfully staved off consolidation of cable networks in the hands of cable operators, it only replaced it with consolidation of cable networks in the hands of the media conglomerates that owned the networks. The result, Time Warner Cable Executive Vice President Melinda Witmer told Congress in 2012, was that cable subscribers were "literally paying billions of dollars to subsidize content that the broadcasters make available for free both over-the-air and via the Internet."[43]

Yet for supposedly being tilted in their favor, the state of the marketplace was not exactly friendly to the broadcast industry; besides the decline in local programming, Witmer noted that cable channels were now showing programs like *Monday Night Football* and the BCS that used to be on the broadcast networks, which she alleged was because media companies were using retransmission consent to prop up their cable networks.[44] Of course, she conveniently omitted that cable operators were, at least nominally, still paying more for ESPN, the network airing those two things, than for any broadcast network. If the retransmission consent marketplace was "tilted" in favor of broadcasters, it was only because it *had* to be in order to correct for the larger marketplace factors favoring cable networks. Broadcast television could only remain an economically viable avenue for programming compared to cable networks – and only barely so at that – if it could continue to collect retransmission consent fees, and that meant, among other things, broadcasters had to hold on to their automatic placement on the basic tier, lest customers forego a tier that included their stations in favor of one of those free avenues for their programming, especially the over-the-air route that was the definition of being a broadcast station.

This, then, is the challenge posed by Aereo and what caused it to strike such fear in the broadcast business. Aereo upended the assumptions underlying the retransmission consent regime and exposed the glaring hole in the middle of it, showed that retransmission consent was always no more than a band-aid for the problem it was trying to solve, and in the process exposed just what broadcasters had given up, or at least were willing to lose: their very identity. The prospect of Aereo or a cable operator offering ESPN to subscribers but not paying the retransmission consent fees that allowed them to be competitive with ESPN was so unacceptable to the broadcast networks that as they continued to lose the early court challenges, they revealed their willingness to destroy the village in order to save it. In April 2013, shortly after the Second Circuit panel's ruling, Carey threatened to pull Fox programming off the airwaves and offer it only to cable subscribers if they didn't get their way with Aereo, and the other networks seemed to approve of his bluster, with Univision chairman Haim Saban admitting he too had looked into the possibility[45] and Moonves intimating he could make a similar move later in the month.[46] Broadcast networks could never truly achieve parity with cable networks so long as there remained the possibility of people getting their content free, over-the-air, with an antenna – in other words, so long as they continued to have the very thing that made them broadcast, as opposed to cable, networks – and as technology continued to develop it would only get easier for people to get their cable networks without paying for the broadcast ones.

Carey inadvertently laid out the paradox in a 2011 News Corporation earnings call: "In many ways, I think a broadcast network should look like a cable network and it should have two real meaningful streams of revenue, subscription and advertising, as we look for this to be a significant part of the revenue for that broadcast business."[47] The unanswered question was, if "a broadcast network should look like a cable network", why wasn't it one, and what was it really gaining by being a broadcast network? If the broadcast networks were willing to become cable networks if they didn't get their way with Aereo, why hadn't they done so already, other than that they couldn't get away with it?

In the early days of cable, getting carriage on a system was as simple as providing a unique service that could entice people to sign up for cable to begin with. Eventually large swathes of the country decided to get on board, while the spots available on the systems started to fill up, and new cable networks had to provide more of a value proposition to justify bumping out another network. Meanwhile, the carriage-fee marketplace opened up a whole new business model for the most popular cable channels to make money in the business. The advent of direct-broadcast satellite and digital cable in the late 90s opened up a wide swath of new territory for new networks to conquer, most of them, as noted in Chapter 2, extensions of existing networks. By the end of the 2000s, most cable systems sported far more channels than were likely to be particularly popular. But around that point, a new Darwinian competition was taking shape, one created not by channel space but by money, specifically the constantly rising price of carrying ESPN and the explosion in the broadcast retransmission consent marketplace.

Increasingly, cable networks have sought to justify charging higher fees (or being carried at all) through marquee programming that viewers won't want to miss – enough to call their cable operator and complain if said operator drops the network at an inauspicious time, if they don't switch to a cable operator that's still carrying it.[48] Sports, of course, is at the top of the list of this sort of marquee programming, but for networks without it creating something that viewers become attached to is much tougher, and comes with its own expenses. Many networks that once relied heavily on movies and reruns, while still using such things to fill out lower-demand times, have invested heavily in original programming, hoping to turn their network into a brand with cachet as shows like *The Sopranos* did for HBO. AMC and FX are the most famous and successful at the tactic with shows like *Mad Men*, *Sons of Anarchy*, *Breaking Bad*, *American Horror Story*, and *The Walking Dead* – shows that have racked up Emmy nominations and wins, as well as large audiences – but even more unlikely networks have dived into the game, such as TV Land, a brand built on old, classic shows, investing in original shows such as *Hot in Cleveland*. The History Channel put a lot of money into reality shows like *Pawn Stars* and *American Pickers*, but ventured into scripted drama in 2013 with *Vikings*. Such shows can appear more central to carriage disputes than the networks they air on, with headlines such as "Dish subscribers could lose 'Mad Men' in dispute", not even mentioning the network at issue, common.[49]

Unencumbered by the need to make a profit from ads alone, and freed from FCC restrictions on language and other content that bedevil broadcast, cable networks have given showrunners considerable creative freedom to make high-quality, critically acclaimed shows that they can brandish in front of cable operators and that attract a devoted audience, no matter how small, willing to cancel their cable subscriptions if they can't get their show, and the result is what many have dubbed a new golden age of television. *Mad Men* never attracted an audience on par with its critical acclaim and Emmy nominations, but it helped AMC increase its subscriber fee to 40 cents a month by 2012.[50] More recently, however, such a tack has started to pay off in ratings as well: *The Walking Dead* has become the most popular scripted show not only on cable, but on all of television in the 18-49 demographic, and with the network fresh off of launching the spinoff *Fear the Walking Dead*, AMC is on pace to nearly double its 2010 ad revenues in 2015.[51]

All this shines a new light on the race to build up new sports networks laid out in chapter 2, and shows that more is at stake than just sports. As much as the likes of CBS, Fox, and NBC may want a powerful sports network for their own sake, they also want a popular network cable companies can't afford to drop. That way, they can force those companies to carry a bunch of other, far less popular, channels.

The vast majority of channels on your cable lineup are owned by a handful of companies. As of July 2015, the cable network in the most households is Food Network, owned by Scripps Networks Interactive, which also owns HGTV, the Travel Channel, the Cooking Channel, and DIY Network. In second place is Discovery Channel, whose owner, Discovery Communications, owns TLC, Animal Planet, and numerous smaller networks. USA is owned by Comcast, which also owns NBC, E!, Syfy, MSNBC, CNBC, Bravo, the Weather Channel, Oxygen, and the Esquire Network, besides NBCSN and the Golf Channel. Cartoon Network is owned by Time Warner, which also owns TBS, CNN, HLN, TNT, HBO, Cinemax, truTV, and TCM. The Disney Channel's namesake owns, besides ESPN and ESPN2, ABC Family, Disney XD, and others – as well as A+E Networks, another joint venture with Hearst (split 50-50 this time) named for the A&E network and which also owns History, Lifetime, and smaller networks like FYI. AMC is owned by AMC Networks, which also owns IFC, We, and Sundance. Fox owns FX, Fox News, the National Geographic Channel, Fox Business, and various spinoff networks, to say nothing of Fox Sports 1 and 2. Nickelodeon is owned by Viacom, which also owns Comedy Central, Spike, MTV, VH1, TV Land, BET, CMT, Logo, and numerous MTV and Nick spinoffs.[52]

The network with the largest distribution Nielsen tracks (meaning mostly that it's a commercial network) not owned by one of these eight companies is the Hallmark Channel, with over 12 million fewer homes than Food Network – and we haven't even gotten to any cable networks owned by CBS, a company relatively less reliant on cable networks but which still owns Showtime, Pop (formerly TVGN), and the CBS Sports Network.[53] The broadly-distributed commercial networks not owned by one of these companies can be counted on one hand, and most are owned by formidable corporations themselves. A cable company that wants the popular channels – ESPN, TNT, USA, Fox News, Comedy Central, AMC, Discovery, and Food Network, on top of any others these companies happen to have – has to carry the lesser ones.[54] With retransmission consent, Disney, Comcast, Fox, and CBS can also tie carriage of their broadcast networks, namely their owned-and-operated stations, to carriage of their cable networks and vice versa. The result is a situation where a cable company's hands are tied as much as the consumer's are.

In 2013, Cablevision filed suit against Viacom in federal court over this sort of bundling practice. Viacom denied actually requiring Cablevision to take smaller channels in order to carry the popular ones, instead saying it merely grants discounts on popular channels if carriers take smaller ones, a defense programmers have used in the past.[55] But Cablevision claimed Viacom wouldn't consider a proposal that included just the popular channels, and would have assessed a penalty of over a billion dollars, more than their entire 2013 programming budget, if Cablevision had carried only the popular channels.[56] The dispute raged on for the better part of two years, only being settled in October 2015, after Cablevision had agreed to be acquired by the Dutch company Altice.[57]

Smaller networks not affiliated with the big media companies supported Cablevision in its suit, and with good reason.[58] With the big media conglomerates owning so many channels, any network not owned by one of these companies, and thus unable to leverage the other networks in the company's portfolio, faces a major uphill battle, and often selling out to one of the big conglomerates is the only way to survive, as when the Sundance Channel was sold to AMC in 2008.[59] Even with the power of the NFL behind it and even with a package of live games, the NFL Network still had difficulty finding its way onto cable packages without the backing of a major media conglomerate; at the nadir of the network's carriage in 2008, the league was talking with ESPN and Fox about partnering with them to help with carriage.[60] Tennis Channel and Bloomberg Television fought long, bruising legal disputes with Comcast, accusing Comcast of favoring their own networks over those owned by other parties, with Tennis Channel winning an FCC decision mandating Comcast increase the network's distribution[61] only to see it overturned by a federal court[62] and Bloomberg winning a court order requiring Comcast to place them near major news networks, namely CNBC and MSNBC, on their channel lineups.[63] Even Discovery Communications complained to the FCC about finding it harder to get good terms for their channels once the owners of broadcast networks started taking greater advantage of retransmission consent.[64] MLB Network had more success by tying its carriage to that of the out-of-market Extra Innings package; it initially announced an exclusive deal for the network and Extra Innings with DirecTV, before striking the same deal and giving up some equity in the network to cable operators under congressional pressure, allowing it to have what was, at the time, the biggest launch in cable history in 2009.[65] NBATV also had success increasing its distribution by tying its fortunes to the out-of-market League Pass package.[66] Since the NBC/Comcast merger, some networks have taken advantage of Comcast's pledge to carry minority-owned networks to gain a foothold in carriage – even if the minorities that own them aren't exactly strapped for resources, like Magic Johnson's Aspire network, Sean "Diddy" Combs' Revolt network, or Robert Rodriguez's El Rey network. Some startups have even reportedly gone so far as to pay cable operators for carriage, including Newsmax TV on DirecTV[67] and beIN Sport.

Even for media conglomerates, launching a new network from scratch is increasingly a losing proposition, certainly not if it doesn't have valuable sports programming. A network that isn't catching on with audiences or giving cable operators reason to fork over more money – or even one that might be redundant with a new programming concept that the suits think will be more valuable – is prone to being converted wholesale into something else, as happened with Fox's sports networks to become Fox Sports 1 and 2 and FXX. It's pretty much the only way they introduce any new programming concepts these days. The newest national non-premium English-language channel any of the eight companies listed above have launched from scratch is the Fox Business network, launched in 2007. Since then, Discovery Home and Leisure, a network primarily about home improvement in the vein of HGTV, was converted to Planet Green, a network about "green" living, and then to Destination America, a network billed as targeting "middle America" with America-centric programming; G4, a network originally about video games but increasingly becoming a generic male-oriented channel, was slated to be converted into the Esquire network, only for owners Comcast to decide to convert the Style network instead out of concern for Style's alleged demographic overlap with other networks in the portfolio, letting G4's carriage whittle away to nothing; Discovery Health was converted into the Oprah Winfrey Network with most of the channel's former programming being merged into FitTV; and Fox Reality Channel was converted into Nat Geo Wild, Fox and National Geographic's answer to Animal Planet.[68] Fuel was subject to rumors of a sale to Viacom[69] and conversion to a UFC-centric network before being converted to Fox Sports 2. Fox Soccer was converted to FXX even though that placed the network next to other sports channels on channel lineups and in many cases on a sports tier.

With media conglomerates asking for more and more money out of cable operators for retransmission consent and sports networks, negotiations for carriage have become increasingly contentious. Blackouts of channels have become a not uncommon phenomenon, and even when they don't happen both sides will often take their case to the media and the public as deadlines loom. Retransmission consent, in particular, has been a particularly nasty battleground that has left sore feelings at cable companies; retransmission-related blackouts increased from 51 in 2011 to 127 in 2013, according to a group of cable companies pushing for retransmission consent reform.[70] Time Warner Cable and Cablevision, the last holdouts for NFL Network, have been especially notorious for going to war with media companies over sports rights and retransmission fees.

When these carriage battles happen, broadcast stations trying to get retransmission consent have limited leverage compared to cable networks. When some of the earliest cable operators to fight retransmission consent fights directed people to network Web sites, networks started cutting off access to Web site feeds for people who got their Internet from a cable operator in a carriage dispute – often with collateral damage – and more recently networks have moved online streams of their feeds to the TV Everywhere model discussed in the next chapter. But broadcast stations still do not change the fact that their content is available free, over the air, and from the beginning cable operators have advised customers to put up an antenna to receive broadcast stations that are being blacked out on the cable provider.[71] Indeed, Time Warner Cable went so far as to give away antennas during its 2013 dispute with CBS.[72]

In 2013, CBS and Time Warner Cable engaged in a very messy dispute that left TWC customers without CBS' owned-and-operated stations in markets like New York, Los Angeles, and Dallas, plus Showtime, for the month of August, as CBS tried to increase its retransmission consent rate from 75-80 cents to a final rate of $2. The two sides reached a deal in September, days before the NFL season kicked off, illustrating how much leverage high-profile, popular programming, especially sports, gives programmers in these negotiations.[73] TWC later acknowledged that the dispute accelerated subscriber losses, while CBS boasted that it wasn't harmed one bit.[74] It's a common dynamic: programmers make cable operators the bad guy for depriving customers of popular programming, while cable operators, already unpopular and blamed for poor service and sky-high cable bills, find it hard to court sympathy.[75]

Much as TWC did with CBS, cable providers often wait until just before high-profile programming is at risk to cut a deal. Turner Broadcasting cut Dish customers off of CNN, Cartoon Network, and related networks in October 2014; about a month later, with the deadline for the popular TNT and TBS networks – including TNT's NBA coverage – looming within a couple of weeks, reached a short-term extension that kept all the networks on the air into 2015,[76] and with that deadline approaching at the start of April, as TBS prepared to show the NCAA Final Four, the two companies struck a long-term agreement.[77] Dish also engaged with spats with CBS and Fox News in late 2014 as well.[78]

Virtually from its inception, DirecTV aligned itself closely with sports, touting its sports coverage heavily in advertising, led by its exclusive carriage of the NFL's Sunday Ticket out-of-market package. But even DirecTV has its limits when it comes to the rising cost of sports, especially since, unlike Verizon, AT&T, and cable providers, it doesn't sell Internet or home phone service, at least not directly, and therefore doesn't have that as a revenue stream.[79] In 2009, it blindsided executives at Comcast by taking its then-Versus network off the air.[80] The network remained off the air for the entire NHL regular season, with a deal only being reached right before the playoffs. DirecTV also had rancorous, public negotiations with YES Network and Fox two years later, although no networks went off the air then. As mentioned in the last chapter, DirecTV is at the epicenter of the CSN Houston and SportsNet LA disputes, and also hasn't carried the Pac-12 Networks since their launch. DirecTV even assessed a $3 surcharge to customers in markets with multiple regional sports networks.[81] All this led to some speculation that DirecTV would give up its Sunday Ticket exclusivity, especially with the value of the package diluted by the expansion of the Thursday night schedule and NFL RedZone being made available to cable operators,[82] but DirecTV and the NFL have re-upped.

As disputes have grown more contentious, and factors that will be explored in the next chapter have shaken up the landscape, carriage disputes have lasted for longer and taken on deeper implications. Suddenlink Communications, a cable operator in mid-size markets centered on the Midwest, dropped Viacom channels in October 2014, and the dispute raged on so long that by late February, CEO Jerry Kent raised the possibility that Viacom's channels might never return, saying the company had "moved on".[83] Others also raised the possibility of limiting their channel selection. "Mathematically, we're probably not going to be able to carry all the major [programmers] long-term, because we just don't want to raise prices to $100 a month," said Dish chairman Charlie Ergen.[84]

Cable companies are paying high prices for ESPN and regional sports networks that they pass on to all of their customers, no matter how much or how little of those networks they watch. With media companies looking to get their own piece of ESPN's lucrative subscriber fee income, cable companies looking to get on the other end of the equation by starting their own regional sports networks, and sports leagues, teams, and conferences looking to fully or partially cut out the middleman, the cost of sports rights is skyrocketing, a cost all these networks, new and old, pass on to cable companies. Facing the prospect of increased subscriber fees for ESPN, RSNs, and numerous sports networks that have launched in the last decade-plus, as well as retransmission consent fees for broadcasters looking to avoid losing their own sports rights to the cable networks, cable companies have engaged in increasingly heated showdowns over the cost to carry all these networks, which have left customers caught in the middle, losing channels when the two sides can't agree and seeing their rates go up when they do. It's a seemingly unstable situation built on an unfair business model, and one might wonder if it's prone to collapse. In our final chapter, we examine several forces that could collapse it, and may already be doing so – and indeed, stand poised to undermine the entire structure of cable television as it has existed for close to 40 years. In the short term, however, those forces are only underscoring the importance of sports to the television industry – and in the process, uncover the real reason for their importance, a reason that even the parties involved seem to be at best dimly aware of.

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